84-895

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL EVANS,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below deny the defendant Michael Evans due process of law by convicting him where the evidence offered at trial by the state failed to prove Evans' guilt beyond a reasonable doubt?

2. Did the trial court abuse its discretion in sentencing the defendant to a specific period of incarceration in the form of straight time and periodic imprisonment where the imposition of the maximum probationary period of thirty months alone would have served the State's objectives just as well.

TABLE OF CONTENTS

Questions Presented for Review. . . i

Table of Contents ii

Table of Authorities. iii

Review of Proceedings Below 1

Jurisdictional Statement. 3

Constitutional Provisions Involved 4

Statement of The Case 4

Reasons for Granting The Writ:

I. THE COURTS BELOW ERRED IN FINDING THE EVIDENCE SUFFICIENT TO ESTABLISH EVANS' GUILT BEYOND A REASONABLE DOUBT 26

II. THE APPELLATE COURT ERRED IN FAILING TO EXERCISE THEIR POWER TO REDUCE THE EXTENSIVE SENTENCE IMPOSED BY THE TRIAL COURT . . 41

Conclusion. 49

TABLE OF AUTHORITIES

Cases

People v. Bonzi, 65 Ill. App.3d 927, 382 N.E.2d 1300 (2d Dist. 1978). . 36

People v. Biers, 41 Ill. App.3d 576, 353 N.E.2d 389 (3d Dist. 1976) . . 38

People v. Bryant, 24 Ill. App.3d 1014, 322 N.E.2d 233 (2d Dist. 1975) 43,46

People v. Collins, 85 Ill. App.3d 1056, 407 N.E.2d 871 (1st Dist. 1980) 40,41

People v. Ellis, 74 Ill.2d 489, 384 N.E.2d 331 (1978) 27

People v. Hawn, 99 Ill. App.3d 334, 425 N.E.2d 1024 (1st Dist. 1981). . 34

People v. Krebel, 130 Ill. App.2d 815, 264 N.E.2d 279 (5th Dist. 1970). 46

People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1982). 43

People v. Luttmer, 48 Ill. App.3d 303, 362 N.E.2d 1093 (2d Dist. 1977) 37

People v. Parr, 133 Ill. App.2d 365, 125 N.E.2d 510 (1955). 35,36

People v. Potter, 5 Ill.2d 365, 125 N.E.2d 510 (1955). 35

People v. Wolter, 78 Ill. App.3d 32, 396 N.E.2d 1102 (1st Dist. 1979) . . 34,40

People v. Ziegler, 78 Ill. App.3d 490, 396 N.E.2d 1160 (1st Dist. 1979). 36

United States v. Read, 658 F.2d 1225 (7th Cir. 1981). 39

Constitutional Provision

U.S. Const. Amend. XIV 4

Statutes

Illinois Revised Statutes, ch. 38, §9-3(a) (1981). 39

Illinois Revised Statutes, ch. 110A, §615(b)(4) (Sup. Ct. Rule 615(b)(4) (1981). 43

Illinois Revised Statutes, ch. 38 §§9-3(b)(2), 1005-6-2(b)(2) (1981). 48

Illinois Revised Statutes, ch. 38 §1005-7-1 (1981). 2,3,25

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MICHAEL EVANS,	)
	)
Petitioner,	)
	)
vs.	)
	)
PEOPLE OF THE STATE OF ILLINOIS,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

REVIEW OF PROCEEDINGS BELOW

Upon convicting Michael Evans on three counts of reckless homicide, the trial court sentenced Evans to thirty months' probation, with the first six months to be served with the Cook County Department of Corrections and last ninety days to be served by periodic imprisonment on weekends. (App., p. 35-38).

Evans filed a timely appeal, and the Appellate Court of Illinois, First Judicial District, affirmed the conviction of reckless homicide but remanded the case for resentencing. The court held that the trial court erred in sentencing Evans to six months incarceration in addition to the term of periodic imprisonment. The Unified Code of Corrections, Ill. Rev. Stat. ch. 38 par. 1005-7-1(c) (1981), specifically precludes the sentence of six months straight time and periodic imprisonment as conditions for a probationary sentence. (App., p.2-3-4).

Defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on October 2, 1984.

JURISDICTIONAL STATEMENT

Michael Evans was found guilty on three counts of reckless homicide by the Circuit Court of Cook County, Illinois, on September 22, 1982. On May 8, 1984, the Appellate Court of Illinois, First Judicial District, affirmed Evans' conviction, but remanded for resentencing because the Illinois statute, Ill. Rev. Stat. ch. 38, par. 1005 -7-1(c) (1981), precluded a sentence of straight time and periodic imprisonment as conditions of probation. A petition for rehearing to that court was denied June 8, 1984. A timely petition for leave to appeal to the Illinois Supreme Court was filed on July 13, 1984, and denied on October 2, 1984.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States:

Section 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant, Michael Evans, was charged with reckless homicide arising out of a collision between an automobile driven by John Best and another automobile in Calumet City, Illinois. The defendant's car was not involved in the

accident. Two of the passengers in Best's auto were killed - fifteen year old Patricia Koerner and eighteen year old Ronald Gibbs. The driver of the car Best collided with, forty-two year old Sherry Kasee, was also killed. (R. 18, 24, 28).

At the time of his trial, Michael Evans was seventeen years old (R. 393). According to his testimony at trial, both he and Best were carrying three passengers in their respective vehicles on the evening of the accident. (R. 410, 432). The two cars stopped at Best's house to get some oil for Evans' car. (R. 406). Evans and Best then proceeded to drive from Indiana, where Best resided, into Illinois, where Evans resided, eventually reaching the intersection of Torrence

Avenue and 159th Street in Calumet City, heading north. (R. 410). During this drive, Best was nearly always following Evans' automobile, as Best was unfamiliar with the streets in Illinois. (R. 427-428, 433-434). Upon their arrival at the intersection, the teenagers were planning to stop at a nearby McDonald's Restaurant and then go to the home of one of Evans' passengers. (R. 432, 434).

When the two cars arrived at the intersection, a van driven by Catherine Campbell was waiting there for a red light. Evans pulled up to the left side of the van and Best, who had been following Evans, pulled up on the right of Campbell's van. The lanes occupied by Evans and Campbell were both intended for cars proceeding north. The far right lane, occupied by Best's car, was

intended both for cars turning right and for those continuing north. (R. 101). The far right lane that Best occupied ended a few hundred feet north of the intersection, and all cars using that lane were forced to merge to the left. (Tr. 123, 419). Another driver, Tom Juricic, was directly behind Best's car in the far right lane. (R. 298). The posted speed limit on this stretch of Torrence Avenue was either 40 or 45 miles per hour. (R. 67, 174, 18[illegible], 315, 339, 468-470).

Four eyewitnesses testified differently as to the events after the traffic signal turned green. Evans testified that he took off from the intersection at a normal rate of speed, intending to switch from the left lane to the right lane, because the left lane on Torrence

Avenue was bumpy and he did not like driving in it. (R. 398). Since he was having trouble with his automobile's oil pressure, Evans disengaged his clutch while waiting at the intersection for the traffic light to change and revved his engine so the oil pressure would rise. This was standard procedure in Evans' car. When he let the clutch back out, the tires "chirped", or grabbed, and the vehicle accelerated. (R. 400).

Evans testified that he moved into the right lane about three hundred feet past the intersection, and ten to twenty feet beyond the spot where the far right lane ended. (R. 418-419). Evans made this lane change to avoid the bumpy left lane. (R. 439). When Evans changed lanes, he could see Best's car in his

rear view mirror, (which by then was in front of Campbell's van). (R. 439). Evans slowed down to wait for Best and then looked into his rear view mirror again. At this point, Evans testified that he saw Best to be about "a block" behind him and that Best had been involved in an accident. (R. 402, 441). Evans immediately turned around and drove to the scene of the accident, and again returned to the scene after calling for help at a police station. (R. 441, 443-444). The collision involving Best's automobile occurred on Torrence Avenue about halfway between the intersections of 159th Street and Michigan City Road. (R. 422). Evans had not been racing with Best and had not attempted to prevent Best's car from overtaking his own. (R.

436). Evans did not know what had caused the accident. (R. 402).

Seventeen year old Diana Dougall was one of Michael Evans' passengers on the night in question. Dougall testified that when the light changed at 159th Street, Evans' tires squealed and the automobile accelerated enough so that she was pushed back in her seat a little bit. (R. 159). There had been no conversation between Evans' and Best's cars at the interesection. (R. 176). Evans pulled ahead of Best, at a speed which Dougall estimated to be approximately 55 miles per hour. (R. 163, 177). After leaving the intersection, Dougall no longer saw Best's vehicle; it was nowhere near Evans' car. (R. 169, 177). Evans slowed down approximately halfway between

159th Street on Michigan City Road, a stretch of Torrence Avenue having no street lights. (R. 163, 166). "A little while after" Evans slowed down, a matter of seconds at least, Dougall heard a loud crash from behind. (R. 163, 173). She turned around and saw that Best's automobile had been involved in an accident. (R. 164). Dougall did not know what, if anything, had caused Best's car to lose control. (R. 172).

Catherine Campbell, the twenty-seven year old driver of the van, testified that Evans' and Best's vehicles were inching forward before the traffic light turned green. (R. 105). She did not see or hear any communication between the two cars. (R. 123). She also did not hear any motors revving or, when the light

turned green, any tires squealing, although both vehicles were capable of spinning their tires. (R. 145-146). After the light changed, Evans and Best started out at a rate of speed which Campbell estimated to be 65 to 70 miles per hour. (R. 106, 109). Campbell then "backed off" because Best's car, in the far right lane, was merging into Campbell's lane. (R. 107). The cars driven by Evans and Best continued to drive side by side. (R. 109). Campbell did not notice any weaving or improper driving on the part of these cars other than their high rate of speed. (R. 147). There was no other northbound traffic. (R. 134). Since it was dark, all Campbell could see were the taillights of these two cars. (R. 109).

Further down Torrence Avenue, it appeared to her as if Evans' car's taillights went into the right lane in front of Best's car's taillights; after that Campbell could only see one set of taillights. (R. 110). The cars were half a mile from her when the lane change occurred, and she could not tell how far apart the cars were from each other; the distance could have been one car length or five. (R. 126, 132, 134). After that, Campbell paid no more attention to the taillights. (R. 127). When she arrived "about where the taillights went into one lane," she observed smoke and the aftermath of the accident. (R. 111). Among the particular things she noticed was smoke coming from under the hood of Best's car. (R. 111-112). Catherine

Campbell's late husband, formerly a professional automobile racer, had died in an automobile accident. (R. 100, 137). After testifying about this death, she became so emotionally distraught that the court called a recess. (R. 138).

Tom Juricic, the seventeen year old driver of the car that was behind John Best's automobile at the intersection testified that he began making a right turn after the traffic light changed and Best's car moved forward. (R. 300). Juricic noticed no unusual or inappropriate acceleration on the part of Best's automobile. (R. 300). Upon hearing a "chirping", or very quick squeaking of tires, he looked back at the intersection. (R. 301). Best's car and Campbell's van were side by side in the

intersection, and Michael Evan's car was in front of them by a full car length. (R. 302, 313). Juricic did not see what happened to the cars past the intersection. (R. 310). Regarding the lane conditions near the intersection, Juricic said that both the left and far right lane had a lot of loose rocks, and the best lane to drive in was the center lane, which eventually became the right lane of northbound Torrence Avenue. (R. 316).

Calumet City Police Officer Peter Miller described the scene of the accident. Sherry Kasee's automobile was facing west across the inside southbound lane with heavy front end damage. (R. 34). Best's car was facing southbound in the outside lane with heavy rear and side

damage. (R. 35). The impact between these two cars had occurred on the inside southbound lane. (R. 85). Two other vehicles, a Chrysler and a Ford, were less extensively damaged. (R. 35). George Zorich, the driver of the Chrysler, testified that this damage had occurred when Best's automobile came from the northbound lanes and struck Zorich's car after first colliding with Kasee's; the driver of the Ford then bumped Zorich from behind. (R. 184). Officer Miller also described the stretch of Torrence Avenue between 159th Street and Michigan City Road as being very dark, with forest preserve land on either side, and being "a little bumpy". (R. 36, 42, 73). Zorich concurred that the road surface was rocky and full of gravel and dirt. (R. 195).

Calumet City Police Officer Leonard Kieltyka testified that the length of the skid marks indicated that Best's car had been travelling between 45 and 54 miles per hour, but that the vehicle must have been going faster because it did not stop on its own. (R. 380). Looking at pictures of Torrence Avenue near the scene of the accident, he was able to point out cracks in the left northbound lane which were bumpy and choppy, and he stated that the right lane seemed to be in better condition than the left. (R. 357, 359, 384).

The autopsy reports showed that neither Ronald Gibbs nor Patricia Koerner, the two victims who were passengers in Best's automobile, had alcohol in their blood. (R. 212-213). Michael

Evans testified that none of the teenagers had drank alcohol or used drugs on the evening of the accident. (R. 442). The third victim, Sherry Kasee, had a blood alcohol concentration of 0.161. (R. 213).

At the close of the State's evidence, the defendants moved for directed verdicts which were denied by the Court. (R. 291). The court found Michael Evans and John Best guilty of reckless homicide,stating that it believed Campbell's estimate of the speed of the automobiles rather than Dougall's. (R. 516). The court inferred "from the cloud of smoke", which it said both Dougall and Campbell had described, that Evans had blocked the forward progress of Best's automobile, causing Best to take evasive action in

order to avoid hitting Evans' car. (R. 516-517). Thus, the court concluded, the speed and manner of Evans' and Best's driving caused the accident. (R. 517-518).

Betwen trial and sentencing, Evans' counsel filed and argued a motion for reconsideration on the ground that the evidence had been insufficient to support the court's findings. (R. 680, Supp. R. 2). After hearing counsel's argument, the court stated, "your contention would be true and would be applicable if all of the people who [had] testified, stood on the same par or on the [same] level of credibility." (Supp. R. 19). The court then denied the motion. (Supp. R. 19).

Finally, in denying Evans' motion for a new trial, the court indicated that

it had "great difficulty" with the testimony of Michael Evans. (R. 533). In particular, the court indicated its disbelief of Evans' testimony regarding the procedure he followed in response to his car's oil pressure problems. (R. 534). The court also found that "the testimony as given by Mrs. Campbell tells the position of the vehicles more truthfully, more accurately, than as told by Mr. Evans." (R. 535). In denying the motion, the court concluded, "[I]t's only by virtue of the circumstances that Evans and Best left [the intersection] at the same time that the tragedy occurred." (R. 536).

At the sentencing hearing, the State presented the testimony of Donald Koerner, the father of one of the

accident victims in aggravation. (R. 538). Koerner said that he saw Michael Evans driving erratically at about 5:00 p.m. on the day the trial ended. (R. 540-544). By "erratically", Koerner was referring to Evans' speed of approximately twenty-five miles per hour in approaching the driveway of Rhoda Haney, who lived across the street from Koerner. (R. 548, 550). Koerner further testified that Evans first skidded into the grass along the fence, then had to back up in order to pull into the Haney's driveway. (R. 545-546). Koerner said that a call to the police was made from his house because of Evans' driving and that Evans was escorted from the area by the police. (R. 546, 549). Mr. Koerner said that he had seen Evans drive

"erratically" on other occasions. (R. 549). He also testified that, "I'm very angry, like any father who has lost a daughter." (R. 552).

Michael Evans' girlfriend Rhonda Haney explained the incident which had occurred in front of her house. (R. 598). She and Evans had driven to her house, gone inside, come back out, and started to back Evans' car out of the driveway. (R. 598). Several members of Ronald Gibbs' family (Gibbs was killed in Best's car) approached them, and Gibb's brother threatened to kill Evans. (R. 598-599). Evans ran into Haney's house, and Haney's mother called the police, who came and escorted Evans safely out of the area. (R. 599).

Michael Evans' career counselor at Thornton Fractional North High School testified on his behalf in mitigation. She described Evans as "more than cooperative", a person who worked hard and tried hard. (R. 594). His grades were a little above average and had improved after his enrollment in a vocational program. (R. 593). Evans was enrolled in the auto body shop, which was separate from the auto mechanics school and which concentrated on fender and body repair. (R. 595-596).

James Evans, Michael's father, testified that his son had never had disciplinary problems or problems with the police. (R. 602). Michael Evans' presentence investigation report revealed that he had no prior juvenile or adult criminal record. (R. 695-599).

The trial court revoked Michael Evans' driver's license and sentenced him to thirty months probation, with the condition that the first six months be served in the Cook County Department of Corrections and the final ninety days be served with weekends in jail. (R. 621-624). The court imposed the conditions of incarceration because, in its view, to do otherwise would "shockingly diminish the severity of the offenses." (R. 623). John Best's Illinois driving privileges were revoked and he was sentenced to thirty months probation, the first six months consisting of periodic imprisonment. (R. 624). The court gave Best the option of serving his periodic imprisonment in the Lake County, Indiana, jail if he could arrange it. (R. 627).

The court based the disparity in the sentencing on its belief that "there is a greater degree of culpability here in the driving of Evans as opposed to the driving of Best." (R. 635). Before the proceedings ended, the trial court set an appeal bond for Michael Evans. (R. 631).

Evans filed a timely appeal, and the Appellate Court of Illinois, First Judicial District, affirmed the conviction of reckless homicide but remanded the case for resentencing. The court held that the trial court erred in sentencing Evans to six months incarceration in addition to the term of periodic imprisonment. The Unified Code of Corrections, Ill. Rev. Stat. ch. 38, par. 1005-7-1(c) (1981),specifically precluded the sentence of both six months straight time

and the ninety days periodic imprisonment as conditions of probation.

REASONS FOR GRANTING THE WRIT

I.

THE COURTS BELOW ERRED IN FINDING THE EVIDENCE SUFFICIENT TO ESTABLISH EVANS' GUILT BEYOND A REASONABLE DOUBT.

Michael Evans was convicted of reckless homicide for the deaths of three people in a fatal traffic collision which did not involve the automobile he was driving. This conviction was entered even though the State produced no evidence at trial that Evans had either driven "recklessly" as defined by law or caused the fatal accident in question. Based on this insuffiency of evidence,

the conviction of Michael Evans for reckless homicide must be reversed.

The defendant has not and does not now deny that deference is to be given to the trier of fact's determination in a matter such as this. But the Illinois courts of appeal failed in their review of this matter to apply the rule set forth by the Illinois Supreme Court that where the evidence fails to sustain the verdict, or is improbable, unsatisfactory or inconclusive, the courts have a duty to set aside a conviction. People v. Ellis, 74 Ill.2d 489, 384 N.E.2d 331, 334 (1978).

Applying the criteria set forth in Ellis to the defendant's case, the result becomes clear. Evan's conviction for reckless homicide cannot stand because

the evidence put forth by the State at trial was improbable, inconclusive, and contrary to the human experience. This was manifested by the trial court's virtually exclusive reliance on the testimony of Catherine Campbell in drawing the erroneous inference that Evans switched lanes in such a way as to cause Best to swerve into oncoming traffic. (R. 516, 517). The appellate court seems to have also adopted Ms. Campbell's testimony about the incident as accurate and conclusive. Defendant however contends that even lending all credibility to the testimony of Campbell, it is still insufficient to establish the State's case against the defendant beyond a reasonable doubt.

Catherine Campbell observed Evans and Best prior to the accident when Evans pulled alongside the left side of her van and Best pulled up on the right at the intersection of Torrence Avenue and 159th Streets. While Campbell's testimony indicated that Evans and Best started out from the intersection at a high rate of speed (R. 106), she also explicitly stated that she heard no revving of the motors by either Evans or Best's vehicle and that she did not hear the tires of either vehicle squeal. (R. 145-146). Campbell further stated that after Best switched lanes so that he was directly in front of her they continued to proceed north on Torrence in a side by side manner. (R. 107, 109). In this regard,

Campbell's testimony was the only indication that the cars were travelling side by side; all other witnesses present at trial indicated that Evans' car was well ahead of Best's at this time. (R. 177, 313, 439). This evidence lessens the likelihood that Evans was dangerously close to Best when he moved his automobile into the right lane.

Once the cars passed Campbell, she could see only the taillights of the vehicles due to the fact that it was dark out. (R. 109). When the cars were approximately one-half mile in front of Campbell, she stated that it seemed as if the taillights of Evans' car went into the right lane in front of Best's car's taillights leaving only one set visible to her. (R. 126, 110). Campbell said

she could not tell how far apart the vehicles were from each other; the distance could have either been one car length or five. (R. 132, 134). After that point, Campbell paid no more attention to the taillights. (R. 127).

Campbell's testimony must be evaluated in the context of the other testimony presented at trial, testimony to which the trial and appellate courts seem to have given little consideration. Tom Juricic, the driver directly behind Best at the traffic light, stated that he noticed no unusual or inappropraite acceleration by Best's car. (R. 300). Diana Dougall, a passenger in Evans' car, testified that upon pulling away from the light, Evans went ahead of Best, and Dougall did not see Best's car again un-

til the accident because Best's car was not near. (R. 163, 169, 177). Dougall only became aware of the accident involving Best's car when she heard a crash and turned around to look. (R. 164, 173). Dougall did not have any knowledge of what caused Best to lose control of his automobile. (R. 172). The testimony of defendant corroborated that of Dougall in that he stated he changed lanes to avoid a bumpy stretch of pavement. (R. 439). As defendant changed lanes, he saw Best in his rear view mirror, five or six car lengths behind. (R. 439). Due to the distance between the vehicles, defendant's lane change neither cut Best off nor caused him to take evasive action. To surmise otherwise is pure conjecture drawn only from the testimony of

one witness, half a mile behind the cars of Evans and Best, that two sets of tail-lights became one. In no way can testimony of this nature be sufficient to establish the guilt of the defendant beyond a reasonable doubt.

The evidence presented at trial is also contrary to human experience because had Evans, who was driving in the left lane, actually cut off Best (driving in the right lane), Best in an all likelihood would have veered to the right and gone off the shoulder of the road. To have veered left would only have brought Best closer to the danger that Evans allegedly had subjected him to by switching lanes too close to Best's vehicle.

The inference drawn by the trial court based on the testimony of Campbell

and Dougall was unfounded and improbable. In the absence of such inference, the evidence offered was insufficient to prove either that Evans was driving in a reckless manner or that his actions caused the deaths of the three victims. In the absence of any evidence that Evans actually did make an improper lane change, the hypothesis that he caused the accident was no more likely than several other innocent hypotheses. Where a defendant has been charged with reckless homicide, as with all other criminal cases, if the accident may be attributable to either an innocent or a criminal cause, the innocent hypothesis must be adopted. People v. Hawn, 99 Ill. App.3d 334, 425 N.E.2d 1024, 1028 (1st Dist. 1981); People v. Wolter, 78 Ill. App.3d

32, 396 N.E.2d 1102, 1107 (1st Dist. 1979). In the instant case, based on the evidence introduced at trial, it is no more likely that Evans caused Best to swerve than it is that Best swerved to avoid an animal or obstacle in the road or lost control because of a mechanical malfunction, all of which were advanced as non-criminal hypotheses by defense counsel. (R. 683-684).

Of all the conduct by defendant testified to at trial, the only aspect which was even arguably improper was the speed at which he was travelling. It is well settled however that reckless conduct cannot be proved conclusively by a showing of excessive speed alone. People v. Potter, 5 Ill.2d 365, 125 N.E.2d 510, 513 (1955); People v. Parr, 133 Ill.

App.2d 82, 272 N.E.2d 712, 175 (1st Dist. 1971). Only when the act of speeding is combined with other actions or circumstances indicating a conscious disregard of a substantal risk of death or bodily harm to others does reckless driving occur. Various types of conduct which would fall into this category are speeding combined with the execution of several reckless lane changes, the cutting off of other cars, and the failure to reduce speed while approaching a standing vehicle waiting to make a left turn off on a road with heavy traffic, People v. Ziegler, 78 Ill. App.3d 490, 396 N.E.2d 1160, 1165-1166 (1st Dist. 1979); speeding while intoxicated, People v. Bonzi, 65 Ill. App.3d 927, 382 N.E.2d 1300, 1303 (2d Dist. 1978); and speeding

through a residential area, near a school zone, at 4:00 p.m. with children playing on both sides of the street. People v. Luttmer, 48 Ill. App.3d 303, 362 N.E.2d 1093, 1094 (2d Dist. 1977).

The Appellate Court correctly noted that excessive speed alone is not always sufficient to sustain a conviction for reckless homicide. It erred however in concluding that there were other circumstances present which indicated a conscious disregard of a substantial risk likely to cause death or great bodily harm to others. The "other circumstances" referred to by the appellate court was the trial court's "perfectly logical and proper" deduction that Evans forced Best to take evasive action. However, since the testimony at trial pro-

vided no factual foundation from which this deduction could be inferred, the appellate court erred in finding that there was sufficient evidence to establish the guilt of the defendant.

By allowing a conviction for reckless homicide to be entered against the defendant, where the State failed to prove the guilt of defendant beyond a reasonable doubt in failing to show that he either drove recklessly as defined by law or that he caused the fatal accident, serious constitutional issues are raised. Due process requires that a presumption of innocence must prevail, unless each element of the offense is proved beyond a reasonable doubt. People v. Biers, 41 Ill. App.3d 576, 353 N.E.2d 389, 393 (3d Dist. 1976). Due process

also requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. U.S. v. Read, 658 F.2d 1225, 1332 (7th Cir. 1981). As the testimony of the witnesses at trial clearly indicated, the factual cause of the accident is still unknown. Under the laws of Illinois, a reckless homicide conviction must include the showing of the driving of a motor vehicle as the cause of death. Ill. Rev. Stat. ch. 38, §9-3 (a) (1981). In the case at bar, the State clearly failed to prove that Evans' driving car was the cause of death of the three victims. Additionally, where the commission of a crime is purportedly proven by circumstantial evidence, as in the instant case, "the guilt of the accused must be so thoroughly established

as to exclude every reasonable hypothesis of his innocence." People v. Wolter, 78 Ill. App.3d 32, 396 N.E.2d 1102, 1006 (1st Dist. 1979). In the case at bar, the State failed to establish that Best did not lose control of his car for reasons other than the alleged "cutting off" of Best by Evans. Best could just as well have swerved to avoid an animal, among many other logical explanations, none of which was discounted or refuted by the State.

This court must bear in mind that the presumption of innocence must prevail until the accused is proven guilty under the established methods of procedure. The lower courts have failed to do this thus denying the defendant's right to due process under the law. People v.

Collins, 85 Ill. App.3d 1056, 407 N.E.2d 871, 873 (1st Dist. 1980).

The trial and appellate courts below have disregarded facts which establish that Michael Evans was not proven guilty beyond a reasonable doubt. In overlooking these facts the decisions below have left open for resolution some serious constitutional questions which warrant further review. For these reasons, this Court should grant this petition for a writ of certiorari.

II.

THE APPELLATE COURTS ERRED IN FAILING TO EXERCISE THEIR POWER TO REDUCE THE EXCESSIVE SENTENCE IMPOSED BY THE TRIAL COURT.

As a result of his conviction for reckless homicide, Michael Evans was sentenced to serve a thirty month probationary period by the trial court. This is the maximum probationary period allowed by law for this offense. While the trial court has discretion in imposing sentence on a convicted defendant, the trial court in the case at bar abused its discretion by requiring Evans to serve the first six months of this probationary period in Cook County Jail as well as the weekends of the last three months. The record clearly shows that the stated goals of protecting the public while attempting to rehabilitate the defendant cannot be facilitated in any manner by imposing the imprisonment upon him ordered by the trial court. The courts

below therefore erred in not modifying Evans' probation so as to eliminate these two conditions.

Courts of review are empowered to reduce sentences. Ill. Rev. Stat., ch. 110A, §615 (b)(4) (1982) (Illinois Supreme Court Rule 615(b)(4)). In fact, the court must overturn a sentence where, as here, the trial court abused its discretion. People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344, 348 (1982).

According to People v. Bryant, 24 Ill. App.3d 1014, 322 N.E.2d 233 (2d Dist. 1975), the sentencing court must give consideration to three factors: (1) the rehabilitative effect on the defendant; (2) the necessity to protect society from the defendant; (3) the deterrent effect of the sentence. As can

be seen by the imposition of a sentence of probation for the statutory maximum period of time along with a requirement of imprisonment for a set period of straight time and a period of periodic imprisonment, the terms of the sentence are inconsistent with the stated sentencing objectives and constitute an abuse of the court's discretion.

Apparently, the trial court drew the conclusion from testimony in aggravation by Donald Koerner that the defendant, Michael Evans, is without remorse. The trial court erred in giving such great weight to Koerner's testimony because of his inherent interest in the court's decision and the contradictory relating of the events by Rhonda Haney. (R. 598-5-99). To reach the conclusion of the

trial court as to defendant's remorse is unwarranted and unfair. Evans' conduct immediately after the collision was not indicative of a lack of remorse. Rather, Evans' conduct was motivated by a sincere concern for the four friends riding in Best's car. Immediately upon becoming aware of the accident, Evans turned around and drove to the scene of the accident. Evans then left the scene to call for help at a police station after which he again returned to the scene.

The defendant cannot and does not dent, nor the anguish experienced by the families of the deceased. The fact remains however that the imposition of such a severe sentence upon the defendant will not relieve either. Defendant does not wish to deprecate the seriousness of the

offense, but surely the maximum period of probation for the offense of reckless homicide as was given defendant was sufficient.

In other cases in which the defendant's potential for rehabilitation was great and where the defendant's incarceration was not required to protect the public, the appellate courts have eliminated probationary conditions of imprisonment and periodic imprisonment from the offender's sentence. People v. Krebel, 130 Ill. App.2d 815, 264 N.E.2d 279 (5th Dist. 1970); People v. Bryant, 24 Ill. App.3d 1014, 322 N.E.2d 233 (2d Dist. 1975). As in those cases, incarceration is not required here in light of Michael Evans' unblemished prior record and the extreme unlikelihood that he will

commit other offenses in the future. Evans' potential for rehabilitation is great. He has no prior criminal background, and the offense of reckless homicide is by definition unintentional. It is obvious from the presentence investigation and the sentencing hearing that Evans comes from a close-knit and supportive family. His past performance in school has been shown as cooperative and involving great efforts, as the testimony of his high school career counselor attested. As Evans' father and the presentence report described, Michael Evans has been a steady contributor to the maintenance of the Evans' family business. Any form of incarceration, either straight time or periodic, would only serve to remove Evans from the positive influences of college, work and family.

Any argument that the deterrent effect that Evans' incarceration would allegedly have on others must fail as a result of the previous two considerations. Evans received the maximum allowable probation period of thirty months for reckless homicide, a class 4 felony. Ill. Rev. Stat., ch. 38, §§9-3(b)(2), 1005-6-2(b)(2) (1981). As has already been stated, by definition, Evans had no intention of causing injury as a result of his conduct. It is also true that Evans was not solely responsible for the offense. Evans' co-defendant, John Best, was also convicted of reckless homicide, and it was Best's car, not Evan's, which was involved in the collision. A felony conviction and two and a half years of probationary supervision in a case with a

person who has as much rehabilitative potential and as little propensity to commit crimes as Michael Evans is not so light a sentence as to deprecate the seriousness of the offense or give rise to the danger that others will not be deterred from committing similar crimes.

CONCLUSION

Reasonable doubt remains as to the cause of this tragic accident; it is clear however that it has never been proven, by testimony or otherwise, why John Best's car swerved into oncoming traffic. Evan's conviction for reckless homicide cannot stand while this doubt exists, and the courts below erred in failing to recognize the insufficiency of

the evidence. For the reasons stated above, defendant, Michael Evans, respectfully submits that this Court should grant this petition for a writ of certiorari so that the standard of beyond a reasonable doubt may be restored to its full force.

Respectfully submitted,

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